Supreme Court, U.S.
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NO. ____

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 2000

DAVID JON GOTCHNIK, MARK FRANCIS STEPEC, TERRY LEE ANDERSON AND THOMAS JAY ANDERSON,

Petitioners,

v.

UNITED STATES OF AMERICA,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

James M. Schoessler
Counsel of Record
Mark A. Anderson
Peter G. Griffin
JACOBSON, BUFFALO, SCHOESSLER & MAGNUSON
246 Iris Park Place
1885 University Avenue West
St. Paul, Minnesota 55104
(651) 644-4710

68490

QUESTION PRESENTED

Do regulations of a federal agency restricting the use of motorized vehicles and motorboats in a wilderness area apply to members of a federally-recognized Indian tribe when exercising treaty-reserved subsistence fishing rights?

TABLE OF CONTENTS

Page

QUESTION PRESENTED i

TABLE OF CONTENTS ii

TABLE OF AUTHORITIES iv

OPINIONS BELOW vii

JURISDICTION vii

PROVISIONS OF LAW INVOLVED vii

STATEMENT OF THE CASE 1

REASONS FOR ALLOWING THE WRIT 5

A. The Panel's Interpretation of the 1854 Treaty Conflicts with the Supreme Court Jurisprudence Regarding Treaty Construction 5

1. The Law of Treaty Interpretation is Well Established 5

2. The Panel's Decision Conflicts with Supreme Court Precedent Because it Interprets the Treaty Without any Evidence of the Intent of the Treaty Signors 6

3. The Panel's Decision Conflicts with Supreme Court Precedent by Incorrectly Looking to Congress' Intent in the Act to Determine the Meaning of the Treaty 11

4. The Panel's Decision Incorrectly Shifts the Evidentiary Burden in this Criminal Case 14

B. The Panel's Decision Incorrectly Decided an Important Issue of Federal Law 15

IV. CONCLUSION 19

TABLE OF AUTHORITIES

FEDERAL CASES

Alexander v. Block, 660 F.2d 1240 (8th Cir. 1981) 13

Antoine v. Washington, 420 U.S. 194 (1975) 7

Cass County v. Leech Lake Band, 524 U.S. 103 (1998) 17

Grand Portage Band of Chippewa of Lake Superior, et al. v. State of Minnesota, et al., Civ. No. 4-85-90 (D. Minn.), Memorandum and Order, June 8, 1988 2

Jones v. Meehan, 175 U.S. 1 (1899) 6

Lac Courte Oreilles Band of Lake Superior Chippewa Indians v. Voight, 700 F.2d 341 (7th Cir. 1983) 6, 17

Lac Courte Oreilles Band of Lake Superior Chippewa Indians v. Wisconsin, 653 F. Supp. 1420 (W.D. Wis. 1987) 9

Mille Lacs Band of Chippewa Indians v. Minnesota, 952 F. Supp 1362, 1366, aff'd 124 F.3d 904 (8th Cir. 1997), aff'd 526 U.S. 172 (1999) 9

Minnesota v. Mille Lacs Band of Chippewa Indians, 526 U.S. 172 (1999).....6, 7, 8, 9, 10, 12, 14, 16, 17

Nat'l Assoc. of Property Owners v. United States, 499 F. Supp. 1223 (D. Minn. 1980).....13

United States v. Bellrichard, 779 F. Supp. 454 (D. Minn. 1991).....14

United States v. Bresette, 761 F. Supp. 658 (D.Minn. 1991).....

.....6, 7, 8, 16

United States v. Dion, 476 U.S. 734 (1986).....17

United States v. Gotchnik, 57 F. Supp.2d 798 (D. Minn. 1999).....3, 4, 5, 8, 15

United States v. Michigan, 471 F. Supp. 192 (W.D. Mich. 1979).....9, 17

United States v. Michigan, 623 F.2d 448 (6th Cir. 1980).....9

United States v. Michigan, 653 F.2d 277 (6th Cir. 1981).....17

United States v. Washington, 384 F. Supp. 312 (W.D. Wash. 1974).....9

United States v. Washington, 520 F.2d 676 (9th Cir. 1975).....9

United States v. Winans, 198 U.S. 371 (1905).....6

Washington v. Washington State Commercial Passenger Fishing Assoc., 443 U.S. 658 (1979).....5, 6, 7

FEDERAL STATUTES

16 U.S.C. § 551 (1999).....1

18 U.S.C. § 3401 (1999).....1

28 U.S.C. § 636 (1999).....1

FEDERAL REPORTS

H.R. Comm. Int. and Insular Aff., Rep. No. 95-1117, pt. I (1978).....3

S. Comm. Energy and Nat. Res., Rep. No. 95-1274, p. 15 (1979).....3

FEDERAL REGULATIONS

36 C.F.R. § 261.16 (1999).....2, 3

OPINIONS BELOW

The opinion of the court of appeals (App., *infra,* A-1) is reported at 222 F.3d 506. The opinion of the district court (App., *infra,* A-15) is reported at 57 F. Supp.2d 798.

JURISDICTION

The United States Court of Appeals for the Eighth Circuit entered judgement on August 21, 2000. (App., *infra,* A-3). A timely request for rehearing and rehearing *en banc* was submitted to the court of appeals, and rehearing was denied on October 9, 2000. (App., *infra,* A-30) The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

PROVISIONS OF LAW INVOLVED

Article 11 of the Treaty of September 30, 1854, 10 Stat. 1110-11 provides in relevant part:

> And such of them as reside in the territory hereby ceded, shall have the right to hunt and fish therein, until otherwise ordered by the President.

Section 4 of the Boundary Waters Canoe Area Wilderness Act of 1978, Pub. L. No. 95-495, §4, 92 Stat. 1649.

Section 17 of the Boundary Waters Canoe Area Wilderness Act of 1978, Pub. L. No. 95-495, § 17, 92 Stat. 1649.

> Nothing in this Act shall affect the provisions of any treaty now applicable to lands and waters which are included in the mining protection area and the wilderness.

Section 261.16(a) of Title 36 of the Code of Federal Regulations provides:

> The following are prohibited in a National Forest Wilderness:
> (a) Possessing or using a motor vehicle, motorboat or motorized equipment except as authorized by Federal law or regulation.

STATEMENT OF THE CASE

This appeal presents the consolidated criminal cases of four Petitioners, each of whom was convicted of violating a federal regulation that restricts the use of motorized vehicles or equipment in certain parts of the Boundary Waters Canoe Area Wilderness (the Boundary Waters Area). Jurisdiction in the district court below was predicated on 16 U.S.C. § 551 (1999), 18 U.S.C. § 3401 (1999), and 28 U.S.C. § 636 (1999).

The Petitioners are members of the Bois Forte Band of Chippewa Indians (the Band), a federally-recognized Indian tribe that is a party to the Treaty of September 30, 1854, 10 Stat. 1109 (the 1854 Treaty). Under the terms of the 1854 Treaty the Band ceded to the United States large tracts of land (the Ceded Territory) including the territory encompassing what is now the Boundary Waters Area. In exchange for that cession of land, Article 11 of the 1854 Treaty provides that "such of [the Indians] as reside in the territory hereby ceded, shall have the right to hunt and fish therein . . ." 10 Stat. at 1111.

In 1988, the Band (and other signatory Bands) and the State of Minnesota entered into a consent decree which confirmed the exclusive authority of the Bands to regulate

the Article 11 treaty rights of its members in the Ceded Territory. Grand Portage Band of Chippewa of Lake Superior, et al. v. State of Minnesota, et al., Civ. No. 4-85-90 (D. Minn.), Memorandum and Order, June 8, 1988. Tribal regulation does not prohibit the use of motorized vehicles or equipment by tribal members anywhere in the Ceded Territory.

The incidents which gave rise to these convictions occurred when the Petitioners were fishing within the Ceded Territory pursuant to tribal regulation. Petitioners Gotchnik, Anderson, and Anderson were cited for using outboard motors in a federally-created "no motor" zone. Petitioner Stepec was cited for using an all-terrain vehicle to cross a frozen portion of a lake in the federal "no motor" zone, and was also cited for possessing a motorized ice auger.

The Petitioners were cited pursuant to 36 C.F.R. § 261.16 (1999) which is made applicable to parts of the Boundary Waters Area by the Boundary Waters Canoe Area Wilderness Act of 1978 (the Act), Pub. L. No. 95-495, §4, 92 Stat. 1649, 1650.

Petitioners have consistently maintained that 36 C.F.R. § 261.16 does not apply to them. Section 17 of the Boundary Waters Act specifically provides: "[n]othing in

this Act shall affect the provisions of any treaty now applicable to lands and waters, which are included in the mining protection area and the wilderness." Act §17, 92 Stat. at 1658. The Congressional committee report on the Act provides:

> Section 17 makes clear that the legislation is not to affect the provisions of any treaty which is now in effect. The Boundary Waters are affected by international boundary treaties with Canada, as well as by certain Indian treaties. All these existing agreements are to remain unaffected by the enactment of this legislation.

H.R. Comm. Int. and Insular Aff., Rep. No. 95-1117, pt. I (1978). Similarly, the Senate report provides that "[b]oth versions [of the bill] ensure that all existing agreements (with Canada and Indian tribes) are not affected by the Act. S. Comm. Energy and Nat. Res., Rep. No. 95-1274, p. 15 (1979).

Petitioners moved the district court for a Judgement of Acquittal, which was granted in part and denied in part. United States v. Gotchnik, 57 F. Supp.2d 798 (D. Minn. 1999). Petitioners argued that the United States had failed to prove an essential element of the crime charged. To prove a violation of 36 C.F.R. § 261.16(a), the United States must show that Defendants (1) possessed or used, (2) a motor

vehicle, motorboat, or motorized equipment, (3) in an area to which wilderness restrictions apply, (4) in a manner not authorized by federal law. Petitioners contend that the United States failed to prove this last element because Petitioners' use of motorized vehicles and equipment is otherwise authorized by federal law under Article 11 of the 1854 Treaty. See 10 Stat. 1109.

On the motorized vehicle counts, the district court disagreed and concluded that the original parties to the 1854 Treaty would not have understood Article 11 to include accessing off-reservation fishing and hunting areas by use of modern transportation methods. On Petitioner Stepec's motorized fishing equipment count, the district court granted the Motion for Acquittal, reasoning that the use of modern fishing equipment is conduct within the scope of the 1854 Treaty. The cases of Petitioners Terry Anderson and Thomas Anderson (motorized vehicle charges) were consolidated for purposes of appeal.

On appeal, a panel of the United States Court of Appeals for the Eighth Circuit (the Panel) affirmed the district court as to the motorized vehicle counts.[1] Gotchnik

[1] The United States did not cross-appeal the district court's ruling on the motorized ice auger count.

v. United States, 222 F.3d 506 (8th Cir. 2000) (App., *infra*, A-14). The Panel concluded that the parties to the 1854 Treaty would not have understood Article 11 to include the right to use modern transportation methods while hunting and fishing.[2] Petitioner's request for a rehearing and a hearing *en banc* was subsequently denied. (App., *infra*, A-30).

REASONS FOR ALLOWING THE WRIT

A. The Panel's Interpretation of the 1854 Treaty Conflicts with the Supreme Court Jurisprudence Regarding Treaty Construction.

1. The Law of Treaty Interpretation is Well Established.

To resolve this criminal case, the Panel interpreted the scope and meaning of Article 11 of the 1854 Treaty. For over one hundred years, the United States Supreme Court has been clear that Indian treaties are to be interpreted "not according to the technical meaning of its words to learned lawyers, but in the sense in which they would naturally be understood to the Indians." Washington v. Washington State Commercial Passenger Fishing Assoc., 443 U.S. 658, 676

[2] The Panel did not reach the district court's alternative holding that the restrictions were permissible conservation measures.

(1979), citing Jones v. Meehan, 175 U.S. 1, 11 (1899). Indian treaties must be interpreted liberally in favor of the Indians, and any ambiguities are to be resolved in their favor. Minnesota v. Mille Lacs Band of Chippewa Indians, 526 U.S. 172, 196, 200, 206 (1999); Washington, 443 U.S. at 675-76; Winters v. United States, 207 U.S. 564, 576-77 (1908).

Courts are not only bound to interpret treaties liberally in favor of the Indians, but also in a way to reserve to the tribes all rights necessary to effectuate the purpose of the treaty. Winters, 207 U.S. at 575-77; United States v. Winans, 198 U.S. 371, 381-82 (1905).

Article 11 of the 1854 Treaty makes it clear that one purpose of the Treaty was to reserve to the Band members the right to hunt, fish and gather in the Ceded Territory. These usufructuary rights include the right to make a modest subsistence living by hunting and gathering from resources of the land. United States v. Bresette, 761 F. Supp. 658, 660 (D.Minn. 1991); see also Lac Courte Oreilles Band of Lake Superior Chippewa Indians v. Voight, 700 F.2d 341, 348 (7th Cir. 1983) (involving related tribes and similar treaty).

2. The Panel's Decision Conflicts with Supreme Court Precedent Because it Interprets the Treaty

Without any Evidence of the Intent of the Treaty Signors.

The Panel concluded the parties to the 1854 Treaty would not have understood Article 11 to include the right to use modern methods of transportation while hunting and fishing. There is, however, no evidence in the record to support the Panel's conclusion. The Panel's interpretation of the 1854 Treaty, therefore, is in conflict with Supreme Court precedent requiring evidence of the treaty signors' intent.

When interpreting Indian treaties, federal courts at all levels, in both civil and criminal contexts, have consistently relied on historical evidence and context to determine the understanding of the tribal parties regarding the original treaty terms. See, e.g., Mille Lacs, 526 U.S. at 196; Washington, 443 U.S. at 676; Antoine v. Washington, 420 U.S. 194, 197-200, 206 (1975); Bresette, 761 F. Supp. at 662. Since the Petitioners were cited while exercising their fishing rights pursuant to tribal regulation within the Ceded Territory, the United States had to offer evidence to show that the motorized restrictions were consistent with the intent of the treaty signors. See, e.g., Bresette, 761 F. Supp. at 662 (court finds for defendants when United States fails to

present any evidence of treaty intent and some direct and circumstantial evidence supports defendants' position).

In this case, the United States failed to produce any evidence regarding the intent or understanding of the original parties to the 1854 Treaty. Instead, both the district court and Panel assumed from the lack of historical evidence that the parties to the 1854 Treaty would have contemplated the motorized vehicle restrictions in the Act. Gotchnik, 222 F.3d at 510; Gotchnik, 57 F. Supp.2d at 802-03. There is simply no evidentiary support for this assumption in the record. In fact, as noted in the Bressette case, there exists a substantial body of evidence to the contrary – that the Chippewa people were a nomadic people who would have understood hunting and fishing rights to include the right to move about. Bresette, 761 F. Supp. at 660-62.

In addition, the Panel ignored the evidence submitted concerning the subsequent practical construction given to the 1854 Treaty by the Bands. See Mille Lacs, 526 U.S. at 196. The factual record below demonstrates that the system of tribal regulation in place since 1988 does not prohibit the use of motors for uses associated with treaty-reserved hunting, fishing, and gathering.

Speculating as to the original tribal understanding of

the Treaty without any evidentiary showing cannot be reconciled with the Supreme Court's jurisprudence on treaty interpretation. See, e.g., Mille Lacs, 526 U.S. at 196. The Panel's decision reverses the rule that ambiguities in a treaty are to be resolved in favor of the tribal interest, and reverses the rule that a treaty should be interpreted to give effect to its purpose. Mille Lacs, 526 U.S. at 200; Winters, 207 U.S. at 575-77.

In addition, the Panel's assumption regarding the intent of the treaty signors is inconsistent with the reasoning in numerous other federal cases which have specifically held that in exercising treaty hunting and fishing rights, tribal members are not confined to the technology and harvest methods utilized at the time of the treaty signing. Mille Lacs Band of Chippewa Indians v. Minnesota, 952 F. Supp 1362, 1366, aff'd 124 F.3d 904 (8th Cir. 1997), aff'd 526 U.S. 172 (1999); Lac Courte Oreilles Band of Lake Superior Chippewa Indians v. Wisconsin, 653 F. Supp. 1420, 1430 (W.D. Wis. 1987); United States v. Michigan, 471 F. Supp. 192, 260 (W.D. Mich. 1979), remanded on other grounds 623 F.2d 448 (6th Cir. 1980); United States v. Washington, 384 F. Supp. 312, 402 (W.D. Wash. 1974), aff'd 520 F.2d 676 (9th Cir. 1975).

The rationale underlying these cases is that in the absence of written restrictions in the treaties, and in the absence of any historical data indicating the parties intended to restrict the treaty rights, the canons of construction require courts to conclude that the Indians did not agree to any such restrictions, and are free to utilize modern harvest methods and gear. See Mille Lacs, 861 F. Supp. at 838 ("The privilege granted in 1837 was not limited to use of any particular techniques, methods, devices, or gear. The Chippewa incorporated rifles and other Euro-American technology into their hunting, fishing, and gathering before the 1837 treaty and continued to use new technology after the treaty. Neither the treaty journal nor the language in the treaty indicates that the Band should be confined to techniques, methods, devices, and gear existing in 1837."); Michigan, 471 F. Supp. at 259-60; Washington, 384 F. Supp. at 357-58. Indeed, in this case the district court specifically relied on this type of reasoning in dismissing Petitioner Stepec's ice auger count.

In contrast, the Panel adopted an interpretation that limited the scope of the 1854 Treaty rights without any evidence of what the treaty parties originally understood,

and which was contrary to the circumstantial evidence pointed to by the Petitioners, including the findings of the Bresette court and the present day tribal interpretation of the 1854 Treaty. The Panel's decision should be reviewed because its conclusion conflicts with the consistent interpretive framework mandated by the Supreme Court, and its conclusion is not supported by the factual record below.

3. The Panel's Decision Conflicts with Supreme Court Precedent by Incorrectly Looking to Congress' Intent in the Act to Determine the Meaning of the Treaty.

Instead of requiring the United States to make a showing regarding the intent of the treaty signors, the Panel interpreted the Treaty by looking to the intent of Congress in passing the Act. The Panel concluded that the motor restrictions in Section 4 of the Act, which are silent regarding tribal uses of the Boundary Waters Area, trump Section 17, which explicitly provides that no part of the Act is to affect Indian treaties. To reach this conclusion, the Panel assumes, again without any support in the evidentiary record or in the legislative history, that Congress did not

think motorize vehicles were part of the tribal hunting and fishing rights in 1978.

These assumptions contradict explicit Supreme Court precedent regarding Indian treaties. First, the Supreme Court has repeatedly stated that treaties are to be interpreted as the signors would have understood the terms – not upon an assumption drawn from subsequent Congressional silence. Mille Lacs, 526 U.S. at 200, 205. Second, while the Panel's decision acknowledges that Section 4 and Section 17 are seemingly inconsistent, the Panel ignores the canons of treaty construction which mandate that ambiguities are to be resolved in favor of the tribal interest. Id. Instead, the Panel adopts an interpretation that runs counter to the tribal interest in this case, and which does not attempt to further the purpose of Article 11.

Even if looking to the intent of Congress was appropriate, the Panel erred in its interpretation of the intent of Congress in the Act. First, the plain language of the Act indicates that Congress did not intend for the motorized restrictions to apply to tribal members hunting, fishing and gathering in the Ceded Territory. Section 17

specifically states that nothing in the Act is to affect the exercise of any treaty right held by tribal parties in the Ceded Territory. The Panel erred in concluding that the reference to tribal treaty rights in Section 17 is trumped by the general reference to motorized vehicle restrictions in Section 4. The Panel's interpretation of Section 17 effectively rewrites that section to read "[Everything] in this Act shall affect the provisions of any treaty . . ." rather than "Nothing in this Act shall affect the provisions of any treaty . . ."

Second, the Panel's unsupported assumption that Congress did not think using modern transportation methods was within the scope of the 1854 Treaty is mistaken. The Panel's assumption ignores the obvious fact that if motorized vehicles were not widely used to hunt and fish in the Boundary Waters in 1978, there would have been no need for the Act in the first place. See, e.g., Nat'l Assoc. of Property Owners v. United States, 499 F. Supp. 1223, 1229-30 (D. Minn. 1980), aff'd Alexander v. Block, 660 F.2d 1240 (8th Cir. 1981) (non-Indian sportsmen and property owners sue to prevent implementation of motor ban).

4. The Panel's Decision Incorrectly Shifts the Evidentiary Burden in this Criminal Case.

The result of the Panel's decision is to alter the burden of proof in this criminal case. This is a criminal case the United States chose to prosecute. The burden rests with the United States to prove its case.

Petitioners maintain that as a matter of law the evidence presented by the United States was insufficient to sustain the convictions. Petitioners argued below that Supreme Court precedent requires evidence that the restrictions imposed by the United States are consistent with the intent of the treaty parties. See Mille Lacs, 526 U.S. at 196, 206. The United States has failed to present any evidence as to what the tribal signors to the 1854 Treaty would have understood. No evidence of the understanding of the treaty signors is insufficient evidence to sustain the convictions, and therefore, no reasonable juror could have returned a guilty verdict. See, e.g., United States v. Bellrichard, 779 F. Supp. 454, 459-60 (D. Minn. 1991) (motion for acquittal granted where no evidence supports element of crime).

The Panel even goes so far as to suggest that the evidentiary burden in this criminal case rests with the

Petitioners. The Panel notes that "the Bands have presented no evidence, historical or otherwise, to suggest that the signatories" would have contemplated the use of motor transportation methods. Gotchnik, 222 F.3d at 510 (App., *infra,* A-10).

As an initial matter, Petitioners note that no Indian band is a party to this action. The Panel's inadvertent reference to a tribal party is perhaps indicative of its error in treating this criminal case as if it were a civil appeal involving a tribal party.

In any event, contrary to the Panel's attempt to place the evidentiary burden on the Petitioners, on a Motion for Acquittal the Petitioners are not required to present affirmative evidence. Fed. R. Crim. Proc. 29(b) (motion may be made at end of government's case). To the extent that Petitioners did submit evidence, they showed that their behavior was consistent with the present day tribal regulations concerning the scope of the Treaty rights.

B. The Panel's Decision Incorrectly Decided an Important Issue of Federal Law.

Allowed to stand, the Panel's decision will have at least two major adverse affects. First, the motor restrictions imposed by the United States in this case effectively render

rights reserved under Article 11 of the 1854 Treaty meaningless because they prevent subsistence harvest in large parts of the Boundary Waters Area for all tribal parties to the 1854 Treaty. The Boundary Waters Area is approximately 1,100,000 acres. The rights held by the Band include the right to harvest fish and game for subsistence and to permit access only by foot or canoe necessarily prevents subsistence harvest in a substantial part of the Ceded Territory. In essence, the Bands are denied the benefit of the bargain reached in the 1854 Treaty.

The Panel's decision upsets the balance achieved by the State of Minnesota and the Bands in the 1988 consent decree confirming the Bands' right to regulate tribal members free from state interference. Both the State of Minnesota and the Band acknowledge in the consent decree that Petitioners' rights are necessarily more extensive than the rights of non-Indian sport fishermen. Mille Lacs, 526 U.S. at 204 (treaty gives Indians rights non-Indians do not enjoy and should not be interpreted to render treaty rights an "empty promise"); Bresette, 761 F. Supp. at 660. Under the Panel's decision, the rights of tribal members and non-Indians to hunt and fish in the Boundary Waters Area are effectively the same, and the promise of Article 11 is

rendered nugatory.

Second, on a national level the issue decided in this case will influence the federal government's wildlife management practices over millions of acres of national forest and wilderness designated areas within the United States. Numerous tribes hold off-reservation treaty rights over large tracts of federal land in the midwest and west under a variety of treaties. See, e.g., Mille Lacs, 526 U.S. at 176-77; Washington, 443 U.S. at 667; Lac Courte Oreilles, 700 F.2d at 344-45; Michigan, 471 F. Supp. at 216, *modified in part*, 653 F.2d 277 (6th Cir. 1981). The history and geographic diversity of the complex litigation surrounding off-reservation treaty rights indicates the far ranging impact of this decision.

What is significant about the Panel's decision is that it alters the burden the government must show before it is allowed to restrict otherwise valid treaty rights. This Court's precedent requires that Congress clearly indicate an intention to restrict tribal hunting and fishing rights. United States v. Dion, 476 U.S. 734, 739-40 (1986). In other contexts as well this Court has held that Congress must clear express an intent to limit tribal rights or sovereignty. See, e.g., Cass County v. Leech Lake Band, 524 U.S. 103, 110-111 (1998)

(state and county cannot tax tribe absent unmistakably clear permission of Congress).

In contrast, the Panel's decision allows the United States to use criminal sanctions to restrict the scope of Petitioner's treaty rights without any authorization from Congress. In fact, the Panel's decision permits federal enforcement officials to limit the types of behavior within the scope of a treaty right, despite a clear attempt by Congress in § 17 of the BWCA Act to prevent precisely such an affect.

In addition, the Panel's decision allows the United States to enforce criminal sanctions against tribal members without the evidentiary basis required by Supreme Court precedent. Contrary to the precedent of this Court, there is simply no evidence in the record concerning the intent of the Treaty signors in this case.

The Panel's decision to interpret an Indian treaty without any showing of the parties intent, and in manner contrary to the will of Congress, will drastically limit the rights of tribes which hold valid treaty rights. The scope of these rights, and the ability of Congress to protect these rights through adoption of language similar to Section 17 of the BWCA Act in this case, will be significantly curtailed if

the Panel's decision is permitted to stand.

IV. CONCLUSION

In sum, the Panel erred by ignoring the Supreme Court's interpretive framework for Indian treaties, and by not requiring any evidence that the restrictions imposed by the United States are consistent with the understanding of the tribal signors. If the Panel had based its decision on a review of the record and had adhered to relevant Supreme Court, it would have been compelled to reverse the district court's judgment and overturn these convictions. Since the Panel's decision is in conflict with cases from Supreme Court, and since the Panel's decision will impact the management of millions of acres within the control of the United States' government, the Panel's decision should be reviewed.

Respectfully submitted,

James M. Schoessler, *Counsel of Record*
Mark A. Anderson
Peter G. Griffin
Jacobson, Buffalo, Schoessler &
Magnuson, Ltd.
246 Iris Park Place
1885 University Ave. W.
Saint Paul, MN 55104
(651) 644-4710
Counsel for Petitioners

Dated: January 8, 2001

United States Court of Appeals

FOR THE EIGHTH CIRCUIT

No. 99-4288

United States of America,

Appellee,

v.

David Jon Gotchnik,

Appellant.

No. 99-4289

United States of America,

Appellee,

v.

Mark Francis Stepec,

Appellant.

No. 99-4290

Appeals from the United States District Court for the District of Minnesota.

United States of America,

Appellee,

v.

Terry Lee Anderson,

Appellant.

No. 99-4292

United States of America,

Appellee,

v.

Thomas Jay Anderson,

Appellant.

No. 99-4293

United States of America,

Appellee,

v.

David Jon Gotchnik,

Appellant.

Submitted: May 11, 2000

Filed: August 21, 2000

Before WOLLMAN, Chief Judge, FAGG, Circuit Judge, and HENDREN,[1] District Judge.

WOLLMAN, Chief Judge.

In this consolidated appeal, David Jon Gotchnik, Mark Francis Stepec, Terry Lee Anderson, and Thomas Jay Anderson (appellants) appeal from their convictions in district court[2] for using motorboats and motor vehicles in a wilderness area in violation of 36 C.F.R. § 261.16(a). We affirm.

I.

Appellants are members of the Bois Forte Band of Chippewa Indians, a federally-recognized tribe that was a signatory to the Treaty with the Chippewa of September 30, 1854 (the Treaty), 10 Stat. 1109. Under the terms of the

[1] The Honorable Jimm Larry Hendren, Chief Judge, United States District Court for the Western District of Arkansas, sitting by designation.

[2] The Honorable Ann D. Montgomery, United States District Judge for the District of Minnesota.

Treaty, the Bois Forte and other Chippewa Bands (collectively, the Bands) ceded to the United States a large tract of land located in northern Minnesota, a portion of which has become the Boundary Waters Canoe Area Wilderness of the Superior National Forest (Boundary Waters Area). In return, the signatory Bands retained usufructuary rights in the ceded lands pursuant to Article 11 of the Treaty, which provides that "such of [the Chippewa Indians] as reside in the territory hereby ceded, shall have the right to hunt and fish therein, until otherwise ordered by the President."[3] The Bands have continued to hunt and fish throughout the ceded territory since the adoption of the Treaty, and in 1988 were granted formal authority to regulate their members' use of the ceded lands for these purposes. See Grand Portage Band of Chippewa of Lake Superior v. Minnesota, Civ. No. 4-85-90 (D. Minn. 1988) (approving consent decree requiring Bands to regulate hunting and fishing in ceded territory).

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[3] Usufructuary rights include the right to "live off the land," or to make a modest living by hunting and gathering from the resources of the land. See United States v. Bresette, 761 F. Supp. 658, 660 (D. Minn. 1991). Article 11 of the Treaty has been construed to provide the Bands with full usufructuary rights in the ceded territory. See id. At 661.

At various times in 1998 and 1999, each appellant was cited for violating 36 C.F.R. § 261.16(a). Section 261.16(a), which is made applicable to the Boundary Waters Area by the Boundary Waters Canoe Area Wilderness Act of 1978 (Boundary Waters Act), Pub. L. No. 95-495, §4, 92 Stat. 1649, 1651, prohibits the possession or use of a "motor vehicle, motorboat, or motorized equipment" in a national forest wilderness area "except as authorized by federal law." In each instance, an appellant operated a motor vehicle or motorboat in an off-reservation "no-motor" zone of Basswood Lake in order to reach an off-reservation fishing location within the Boundary Waters Area. Appellants Gotchnik, Terry Anderson, and Thomas Anderson used boats equipped with outboard motors. Appellant Stepec, who traversed Basswood Lake's frozen waters, used an all-terrain vehicle. In addition, Stepec was cited for possessing a motorized ice augur.

Gotchnik and Stepec moved the district court for a judgment of acquittal, contending that their actions were within the scope of their rights under the Treaty and thus that section 261.16 does not apply to them. The court denied the motion as it pertained to Gotchnik's and Stepec's use of motorized means of transportation, reasoning that the original parties to

the Treaty would not have understood it to include the use of modern transportation methods to access off-reservation hunting and fishing areas and, alternatively, that the Boundary Waters Act's restriction on motor vehicles is a permissible conservation measure. As for Stepec's possession of an ice auger, however, the district court granted the motion. The court cited cases upholding the use of modern hunting and fishing implements under the Treaty and further found that there was no sufficient conservation interest to prohibit the use of an ice augur. Gotchnik and Stepec appealed the court's partial denial of their motion, and their appeal was consolidated with the appeals of Terry and Thomas Anderson.

II.

A.

As a preliminary matter, we note, and the government concedes, that Congress has not abrogated the Bands' Treaty right to hunt and fish in the ceded territory located within the Boundary Waters Area. Although Indian treaties are treated like federal statutes and can be abrogated or modified by Congress, Congress must clearly express its intent to do so. See Washington v. Washington State Commercial Passenger Fishing Vessel Ass'n, 443 U.S. 658, 690 (1979). Thus, an act of Congress abrogates or modifies a

specific treaty right only when there "is clear evidence that Congress actually considered the conflict between its intended action on the one hand and the Indian treaty rights on the other, and chose to resolve that conflict by abrogating the treaty." United States v. Dion, 476 U.S. 734, 739-40 (1986).

Here, the Boundary Waters Act does not purport to abrogate or modify the Treaty. To the contrary, section 17 of the Act expressly provides that "[n]othing in this Act shall affect the provisions of any treaty now applicable to lands and waters which are included in the mining protection and the wilderness." Furthermore, the legislative history of the Boundary Waters Act belies any intent by Congress to abrogate the Bands' rights under the Treaty. See Rep. of House Comm. on Interior and Insular Aff. (Rpt. No. 95-1117, Part I) (1978) ("Section 17 makes clear that the legislation is not to affect the provisions of any treaty which is now in effect. The Boundary Waters are affected by . . . certain Indian treaties. All these existing agreements are to remain unaffected by the enactment of this legislation.").

Appellants thus clearly possess the right to hunt and fish in the ceded territory encompassed within the Boundary Waters Area. The question, then, is whether the Boundary

Water Act's prohibition of the use of motorboats and motor vehicles in this area, and the government's prosecution of appellants under this prohibition, offends appellants' rights under the Treaty.

B.

Our interpretation of the Treaty, like all Indian treaties, is guided by special rules of construction. See Washington State Commercial Passenger Fishing Vessel Ass'n, 443 U.S. at 675-76. We must give effect to the terms of the Treaty as the Indian signatories themselves would have understood them. See Minnesota v. Mille Lacs Band of Chippewa Indians, 119 S. Ct. 1 187, 1201 (1999); Jones v. Meehan, 175 U.S. 1, 11 (1899). We must also liberally construe any ambiguous term in favor of tribal interests. See Mille Lacs Band of Chippewa Indians, 119 S. Ct. at 1205; Alaska Pacific Fisheries v. United States, 248 U.S. 78, 89 (1918). When a term is unambiguous when reasonably interpreted, however, we may not ignore this interpretation even if it is against Indian interests. See United States v. Choctaw Nation, 179 U.S. 494, 535 (1900).

Appellants argue that the Treaty, by securing their right to hunt and fish, also secures their right to use modern transportation methods to move about the ceded territory

whenever they are exercising their hunting and fishing rights. First, they contend that the signatory Bands understood their hunting and fishing rights to encompass the use of evolving transportation methods and not to be limited to then-existing methods. To support their position, appellants cite cases involving treaties with similar usufructuary night provisions in which courts held that tribal members were not confined to the use of hunting and fishing implements that existed at the time of the Treaty signing. See Mille Lacs Band of Chippewa Indians v. Minnesota, 861 F. Supp. 784, 838 (D. Minn. 1994), Lac Courte Oreilles Band of Lake Superior Chippewa Indians v. Wisconsin, 653 F. Supp. 1420, 1430 (W.D. Wis. 1987). The government, in response, concedes that the Treaty protects appellants' right to use modern hunting and fishing techniques, but asserts that it does not similarly authorize the use of modern means of transportation to reach the most desirable hunting and fishing locations.

We agree with the government that there is a consequential distinction between appellants' use of evolving hunting and fishing implements and their use of modern means of transportation. The Treaty secures appellants' right to subsistence hunt and fish in the ceded

territory. The use of modern gaming instruments and techniques goes to the very essence of these protected activities, whereas the use of the most advanced means of transportation to reach desired hunting and fishing areas is merely peripheral to them. A motorboat, all-terrain vehicle, or helicopter for that matter, may make it easier to reach a preferred fishing or hunting spot within the Boundary Waters Area, but the use of such motorized conveyances is not part and parcel of the protected act of hunting or fishing, as is the use of a rifle, ice augur, or other hunting or fishing instrument.

That hunting and fishing are distinct from preparatory travel is evidenced by the provisions of the Boundary Waters Act. Congress included within this Act both section 17, which provides that nothing in the Act shall affect existing treaties, and section 4, which sets forth extensive limitations on the use of motorized transportation within the Boundary Waters Area. The juxtaposition of these two provisions indicates that Congress did not consider motor vehicle use to be part of the Bands' right to hunt and fish. Cf. United States v. Gullickson, 981 F.2d 344, 349 (8th Cir. 1992) ("When general and specific statutory provisions apparently contradict, it is well-established that the two may exist

together, the specific provision qualifying or limiting the general." (citation omitted)). Of course, Congress's understanding of the Treaty cannot be substituted for that of the signatory Bands, but we believe that Congress's understanding represents a reasonable and unambiguous interpretation of the Treaty and the Bands have presented no evidence, historical or otherwise, to suggest that the signatories adhered to a different understanding. See Choctaw Nation, 179 U.S. at 535.

Thus, we conclude that although the use of evolving hunting and fishing implements may have been within the understanding of the signatory Bands, the same cannot reasonably be said of the use of modern modes of transportation to reach desired hunting and fishing areas.

Appellants also contend that, even if the signatory Bands did not contemplate the use of modern transportation methods to access hunting and fishing areas, appellants must be accorded such a right in order to effectuate their undisputed right to hunt and fish. As support for their argument, appellants rely on United States v. Winans, 198 U.S. 371 (1905), and Grand Traverse Band of Ottawa and Chippewa Indians v. Director Michigan Dep't of Natural Resources, 141 F.3d 634 (6th Cir. 1998), in which the

Supreme Court and the Sixth Circuit, respectively, held that treaty fishing rights included an "easement of access" to treaty fishing areas.

We find that the facts that necessitated a right of access in Winans and Grand Traverse are not present in this case and therefore that appellants are not entitled to the "access" to hunting and fishing areas that motorboats and motor vehicles can provide. In Winans, Yakima Indians sought to obtain access to fishing areas in which they possessed treaty fishing rights but from which they had been barred by private individuals who had come to own the land fronting these areas. Finding that the Yakima had no other reasonable way to access these areas, the Supreme Court granted the desired access because "[n]o other conclusion would give effect to the treaty." Winans, 198 U.S. at 381. In Grand Traverse, tribal members similarly sued to obtain access to two of the eight fishing areas in which they possessed the treaty right to engage in commercial fishing. Tribal members were unable to access these areas because small boats could not safely reach them and because the municipalities that owned marinas capable of mooring larger vessels were prohibited by state law from using the marinas for commercial use. The Sixth Circuit granted the tribe the

right to moor their commercial ships on the municipal marinas, reasoning that the tribe's fishing rights included the right to access the designated fishing waters and that without use of the marinas their fishing right would be "destroy[ed]." See Grand Traverse Band, 141 F.3d at 640.

Both Winans and Grand Traverse thus involved an impediment that arose after the treaties were signed and which effectively barred tribal members from exercising their treaty fishing rights. Neither condition is present here. First, appellants have precisely the same access to all parts of the Boundary Waters Area that the Bands had at the time the treaty was signed. There has been no intervening sale of adjoining lands to obstructive private parties, see Winans, 198 U.S. at 380, nor has the state subsequently prohibited tribal members from using adjoining lands to access protected hunting or fishing areas, see Grand Traverse, 141 F.3d at 637 n.2, 638. The prohibition that does exist--a restriction on the use of motorboats and motor vehicles--limits only appellants' use of modern forms of transportation, and such conduct, as we have already found, was not within the signatories' understanding of the Treaty.

Second, the Boundary Water Act's prohibition on the use of motorboats and motor vehicles does not effectively

preclude appellants from exercising their hunting and fishing rights, as did the impediments in Winans and Grand Traverse.[4] Indeed, thousands of non-Band members fish in the Boundary Waters Area in compliance with this restriction each year, and although appellants possess the right to fish for subsistence and not merely for sport, they have failed to show how their subsistence fishing is any more burdened by this prohibition than is non-Band members' recreational fishing. To be sure, the prohibition on motorboat and motor vehicle use may make it somewhat less convenient for appellants to reach the most remote regions of the Boundary Waters Area, but we do not think this inconvenience impermissibly infringes upon their Treaty

[4] Appellants argue that the tribal members in Grand Traverse were not, in fact, effectively denied access to their fishing areas, but rather that the state's prohibition of the tribes use of the municipal marinas merely made it less convenient for them to exercise their rights, just as appellants' access to portions of the Boundary Waters Area has been made less convenient. As a basis for this argument, appellants point to a footnote in which the Grand Traverse court noted that the tribe could have reached the fishing areas at issue from a marina that, by round trip, was five to ten hours away. See Grand Traverse Band, 141 F.3d at 640 n.10. We disagree that a mere inconvenience was at issue in Grand Traverse. The court's footnote merely reinforced its conclusion that no other marina was available from which the tribe could feasibly exercise its treaty rights. See id. at 640 ("[T]here simply is no material dispute of fact that [tribal] fishers reasonably require the ability to occasionally moor their vessels at [the municipal marinas]." (citation omitted)). Moreover, the court unequivocally stated that denying the tribe access to the municipal marinas would "destroy [their] rights to commercially fish." Id.

rights. See Wisconsin v. Big John, 432 N.W.2d 576, 581 (Wisc. 1988) (finding that boat registration requirement, although a burden, does not improperly impinge upon tribe's treaty fishing rights).

In sum, we conclude that the Boundary Water Act's prohibition of the use of motorboats and motor vehicles in the Boundary Waters Area does not offend appellants' rights under the Treaty. Having so found, we need not consider whether the Boundary Waters Act and section 261.16 constitute conservation measures sufficiently important to abridge appellants' Treaty rights.

The judgments are affirmed.

A true copy.

Attest:

CLERK, U.S. COURT OF APPEALS, EIGHTH CIRCUIT.

UNITED STATES DISTRICT COURT

DISTRICT OF MINNESOTA

United States of America,

Plaintiff,

v.

David J. Gotchnik,

Defendant,

And

United States of America,

Plaintiff,

v.

Mark R. Steptec,

Defendant.

JUN – 2 1999

Crim. No. 98-262 ADM/RLE

MEMORANDUM OPINION AND ORDER

Crim. No. 98-302 ADM/RLE

Clifford B. Wardlaw, Esq., Assistant United States Attorney, Minneapolis, Minnesota, for Plaintiff.

Mark A. Anderson, Esq., Jacobson, Buffalo, Schoessler & Magnuson, Ltd., Minneapolis, Minnesota, for Defendants.

I. INTRODUCTION

The above-entitled matters came on for hearing before the undersigned United States District Judge pursuant to the Defendants' Motion for the Entry of Judgment of

Acquittal. See 28 U.S.C. § 636(a)(3); 18 U.S.C. § 3401 (a) and (b). For the following reasons, Defendants, motion is granted in part and denied in part.

II. BACKGROUND

Defendants David J. Gotchnik ("Gotchnik") and Mark F. Steptec ("Steptec") are members of the Bois Forte Band of Chippewa Indians, one of the federally-recognized Indian tribes which were signatories to the Treaty of September 30, 1854, 10 Stat. 11-09 ("the 1854 Treaty"). Under the treaty, the Bois Forte and other Bands ("the Bands") ceded to the United States a portion of the State of Minnesota which included what has become the Boundary Waters Canoe Area Wilderness ("BWCAW") of the Superior National Forest. Article 11 of the Treaty provided that "such of [the Indians] as reside in the territory hereby ceded, shall have the right to hunt and fish therein." The Chippewa have continued to hunt, fish, and gather throughout the ceded territory pursuant to regulations adopted by the Bands. See Grand Portage Band of Chippewa of Lake Superior, et al v. State of Minnesota, Civ. No. 4-85-90, Mem. and Order (D. Minn. 1988) (approval of consent decree requiring Bands to regulate hunting, fishing and gathering in the ceded territory).

In July 1998, Gotchnik traveled across Basswood Lake in the BWCAW in a canoe powered by an 8 horsepower motor. See Stipulation of Facts at ¶ 1. Such motors are prohibited in the area of Basswood Lake north of Washington Island. Id. On his return from this "no motor" area, Gotchnik was observed by Forest Service officers. He identified himself as a member of the Bois Forte Tribe, but was nonetheless cited for violating the federal regulation prohibiting the use of motorized vehicles in portions of the BWCAW. Id. at ¶ 3.

In April 1998, Steptec crossed the frozen waters of Basswood Lake on a motorized all-terrain vehicle ("ATV") in order to fish in one of the lake's back bays. Id. at ¶ 6. His ATV and fishing equipment - including a motorized ice auger - broke through the ice and fell into the icy water. Steptec notified the authorities; and once the ice conditions permitted boat travel, Steptec and Forest Service officers retrieved the vehicle and the equipment. Id. Thereafter, Steptec was cited for illegal use of the motorized vehicle and ice auger within the BWCAW. Id. at ¶ 7.

III. DISCUSSION

Because Steptec's citation for the use of the motorized ice auger presents slightly different issues than the arrests for the

use of motorized transportation, the vehicle and equipment violations are addressed separately.

A. Motorized Vehicle Counts

1. Affirmative Defenses

Steptec was charged with "Using motor vehicle in designated wilderness area," in violation of 36 C.F.R. § 261(a). Gotchnik was cited for "Possession and use of outboard motor in federally designated wilderness area," in violation of the same federal regulation. Both Steptec and Gotchnik now argue that, even if the United States has properly proven a *prima facie* violation of the regulation, their treaty rights, as a matter of law, preclude a finding of guilt. They claim that the Boundary Waters Canoe Area Wilderness Act of 1978, 92 Stat. 1640 ("the BWCAW Act") and its accompanying regulations may not be enforced against the Bands insofar as they affect fishing rights guaranteed by the 1854 Treaty. Defendants assert that, as members of the Bois Forte Band, their fishing activities in the ceded territory are subject only to regulation by the Bands and not by the United States government. Furthermore, they claim that the 1854 Treaty necessarily included the right to access fishing grounds through the use of available methods of travel. Finally, Defendants argue that the United States Congress

never intended to abrogate, condition, or limit the exercise of the 1854 Treaty rights when drafting the BWCAW Act. There are two alternate grounds upon which Defendants' motion must be denied.

2. The Signatories to the 1854 Treaty Would Not Have Understood the Document to Include Unrestricted Travel to and From Protected Fishing Grounds.

As stated above, the 1854 Treaty clearly provided the Chippewa with full usufructuary rights over the ceded lands. Usufructuary rights include the right to "live off the land;" that is, to make a modest living by hunting and gathering from the resources of the land. See United States v. Bresette, 761 F.Supp. 658, 660 (D. Minn. 1991); United States v. Gotchnik, Cr. No. 94-05, 1995 WL 312012 (D. Minn. March 28, 1995); Lac Courte Oreilles Bank of Lake Superior Chippewa Indians v. Voigt, 700 F.2d 341, 348 (7th Cir. 1983), cert. denied, 464 U.S. 805 (1983).

Indian treaties are treated like federal statutes and can be modified by congressional mandate. See Minnesota v. Mille Lacs Band of Chippewa, 119 S.Ct. 1187, 1200 (1999); United States v. Dion, 476 U.S. 734, 738 (1986). However, a reviewing court must presume that a statute does not

abrogate the specific treaty rights. Such an abrogation must be through a clearly intended Act of Congress. See Mille Lacs, 119 S.Ct. at 1203 (citing Dion, 476 U.S. at 740) (holding that the Federal government "ha[s] the sophistication and experience to use express language for the abrogation of treaty rights"). As the Supreme Court has held: "What is essential is clear evidence that Congress actually considered the conflict between its intended action on the one hand and Indian treaty rights on the other, and chose to resolve that conflict by abrogating the treaty." Dion, 476 U.S. at 739-40.

The prosecutions in this case were premised on a federal statute and regulations which cannot be read to modify or abrogate the rights reserved under the 1854 Treaty. Indeed, Section 17 of the BWCAW Act provides that: "[n]othing in this Act shall affect the provisions of any treaty now applicable to lands and waters, which are included in the mining protection area and the wilderness." The legislative history of the BWCAW Act further supports the absence of an intended congressional abrogation. The Act's Congressional committee report states:

> Section 17 makes clear that the legislation is not to affect the provisions of any treaty which is now in effect. The Boundary Waters are affected by

> international boundary treaties with Canada, as well as by certain Indian treaties. All these existing agreements are to remain unaffected by the enactment of this legislation.

Rep. of House Comm. on Interior and Insular Aff. (Rpt. No. 95-1117, Part I) (1978). The Defendants maintain valid treaty rights to hunt and fish in the ceded territory, therefore the United States must demonstrate that the prosecutions for the use of motorized vehicles do not offend the 1854 Treaty. Magistrate Judge Erickson considered the same issue in United States v. Gotchnik, 1995 WL 312012, at *3 ("Gotchnik I").[1] In that case, Gotchnik was cited for the use of a snowmobile in the BWCAW and raised the same affirmative defense as in the instant case. Judge Erickson found that, "it is not the existence of the usufructuary rights that were retained under the 1854 Treaty that are at issue but, rather, the nature and extent of the usufructuary rights that are open to contention." Id. at *4 (citing Bresette, 761 F.Supp. at 662). Here, as in Gotchnik I, there is no dispute that the Treaty allowed the Defendants to hunt and fish in the ceded territory. Congress has not abrogated that right. Instead, the operative question is whether the Chippewa would have understood the 1854 Treaty to protect their

ability to travel to the most desired hunting and fishing locations by the latest technological means. It is well-settled that Indian treaties must be liberally construed in favor of Native Americans. See State of Washington v. Washington State Commercial Passenger Fishing, Vessel Ass'n, 443 U.S. 658, 676 (1979); Antoine v. Washington, 420 U.S. 658, 676 (1975); Choctaw Nation of Indians v. United States, 318 U.S. 423, 432 (1943). In order to determine the nature and extent of treaty rights, the "history of a Treaty, the negotiations, and the practical construction of it by the parties to it may all be considered when interpreting an Indian Treaty." Mille Lacs Band of Chippewa v. Minnesota, 861 F.Supp. 784, 791 (D. Minn. 1994), aff'd, 122 F.3d 904 (8`" Cir. 1997), aff'd, 119 S.Ct. at 1187.

Defendants argue, without citation to any authority, that the rights guaranteed by the 1854 Treaty must also logically include the ability to meaningfully realize the benefits. If they are deprived the right to conveniently access the hunting and fishing grounds, Defendants claim that their rights to hunt and fish are rendered effectively hollow. See Def. Mem. in Supp. of Mot. for J. of Acq. at 5. Citing the

[1] The defendant in Gotchnik I is the same individual as in the instant matter.

Sixth Circuit Court of Appeals decision in Grand Traverse Band of Ohawa and Chippewa Indians v. Director, Michigan Dept. of Nat. Res., 141 F.3d 635 (6th Cir.), cert. denied, 119 S.Ct. 590 (1998), Defendants point out that the 1854 Treaty "did not in any way, limit the means by which fish were to be taken from the lakes or restrict the treaty fishers to using technology that was in existence at the time of the treaty." Id. at 639. Defendants argue that treaties such as those at issue here and in Grand Traverse must contain an "easement. of access" to the fishing grounds in order to properly effectuate the treaty rights.

Although Defendants advance an interesting argument, the facts of this case are distinguishable from the Grand Traverse situation and warrant a different result. In Grand Traverse, the State of Michigan prohibited the Indians from mooring large fishing vessels at public marinas, allowing only the use of smaller, "trailered" boats which could be removed from the water each day. The prohibition on the docking of larger boats operated to effectively bar the tribal members from accessing protected fishing banks far out into Lake Michigan - an area which smaller vessels were unable to reach. Id. at 637. Without the ability to moor their

large fishing boats, their "easement of access" to the distant banks was completely eliminated. Id.

By prohibiting Steptec and Gotchnik from accessing the BWCAW using motorized vehicles, the United States has not completely foreclosed Defendants from exercising their fishing rights. Rather, the United States has merely made the exercise of fishing rights in the most remote areas of the BWCAW less convenient. See Gotchnik, 1995 WL 312012, at *6. Regulations prohibiting the use of snowmobiles or boat motors "[do] not deny the full exercise of those rights." Id. As the prosecution argues, "[e]very year there are over 100,000 people who comply with the motorized restrictions and engage in activities such as fishing - the very activity defendants were engaged in when they were cited." Gov't Mem. in Opp, to Mot. for J. of Acq. at 16.

There is no evidence to suggest that the signatories of the 1854 Treaty would have understood the document to allow for unrestricted travel to and from off-reservation fishing and hunting areas through the use of the most advanced technological means. Indeed, this ruling does nothing to diminish the extent of the rights held by the Chippewa at the time the Treaty was signed.

3. The Regulations Prohibiting the Use of Motorized Equipment in the BWCAW Are Valid "Conservation Measures" Which Preempt Existing Treaty Rights.

Alternatively, the United States maintains that the BWCAW Act is a permissible, nondiscriminatory conservation measure. See PuyallupTribe v. Dept. of Game, 391 U.S. 392, 396 (1968) (". . . the manner of fishing, the size of the take, the restriction of commercial fishing, and the like may be regulated by the State in the interest of conservation. . ."). The government may regulate the exercise of the protected activity in the interest of conservation "provided the regulation meets appropriate standards and does not discriminate against the Indians." Id. at 397; see also Mille Lacs, 952 F.Supp. at 1369. The Supreme Court reaffirmed this principle in its most recent Indian law decision. See Mille Lacs, 119 S.Ct. at 1204 ("We have repeatedly reaffirmed state authority to impose reasonable and necessary nondiscriminatory regulations on Indian hunting, fishing and gathering rights in the interest of conservation.").

To show that a particular regulation meets the Puyallup standard, the government "must demonstrate that

its regulation is a reasonable and necessary conservation measure and that its application to the Indians is necessary in the interests of conservation. . ." Puyallup, 391 U.S. at 397 (citing Lac Courte, 668 F.Supp. at 1241).[2]

The BWCAW Act vested the Secretary of the Interior with the power to regulate the BWCAW in concert with the enforcement provisions of the earlier Wilderness Act of 1964, 16 U.S.C. § 1131, et seq., ("the Wilderness Act"). Section 1133(c) of the Wilderness Act "prohibits the use of motorized vehicles in any wilderness area." The BWCAW Act modified this strict prohibition on motorized vehicle use by allowing snowmobile and motorboat operation in limited areas of the park. Specifically, section 4(e) of the BWCAW Act provides that "use of snowmobiles in the wilderness designated by this Act is not permitted . . . except in certain areas, authorizing special use permits for the grooming by snowmobiles of specified cross-country ski trails near existing resorts and use along two designated overland

[2] While most of the regulations regulations at issue in the various Indian Treaty cases are state law provisions, the Puyallup principle has also been extended to Federal government regulation of the exercise of treaty rights. See Dion, 476 U.S. at 734 (abrogation of Yankton Sioux rights to hunt bald and golden eagles); Bressette, 761 F.Supp. at 658 (Migratory Bird Treaty Act did not abrogate treaty right to sell bird feathers).

portages running to Canada."[3] 92 Stat. 1649, § 4(e). The Act similarly limits the use of motorized boats to designated areas. Id. The Forest Service has adopted regulations to specifically govern the BWCAW's restrictions on the use of motorized vehicles. See 36 C.F.R. § 261.16.

Nearly all of the courts adopting the Puyallup holding have upheld state regulations designed to protect individual species of fish or game. See, e.g., Washington State Comm. Passenger Fishing Vessel Assn., 433 U.S. at 682 (upholding state regulations protecting anadromous fish species); Mille Lacs Band of Chippewa v. State of Minnesota, 952 F.Supp. 1362 (D. Minn. 1997) (deer, walleye pike, and muskellunge); Lac Courte, 707 F.Supp. at 1034 (walleye and muskellunge). The question remains as to whether the Puyallup conservation exception should be applied to the protection of a wildlife area in general, as opposed to the conservation of an individual species. As the Ninth Circuit held in United States v. Dann, 865 F.2d 1528, 1538 (9th Cir. 1989) (subjecting land protected by Indian treaty rights to limited regulation of federal grazing rights by the Bureau of Land Management), and Magistrate Judge Erickson ruled in

[3] The snowmobile regulations also encompass the use of ATVs like that driven by Steptec.

Gotchnik I, 1995 WL 312012 at *8 n.12, such an application is appropriate here.

Congress enacted restrictions on motorized vehicle use to maintain the pristine nature of Minnesota's north woods. The BWCAW is one of the largest, well-used wilderness areas in North America. The restrictions on motorized vehicle use are intended to preserve the solitude of the region, protect sensitive ecosystems, and minimize oil and gasoline emissions into the lakes. These prohibitions are integral to Congress" goal of providing an experience in which "the imprint of man is substantially unnoticeable." 16 U. S. C. § 1131(c).

No issue has been raised regarding discriminatory enforcement of the motorized use restrictions in the BWCAW. They apply to both Indians and non-Indians. Indeed, the restrictions have been enforced against the general public since their inception. The Court agrees with the United States that these non-discriminatory regulations are reasonable and necessary conservation measures and that their application to tribal members and non-members alike is in the interest of conservation of the BWCAW. This "conservation exception" pursuant to Puyallup is a second basis upon which Defendants" request for the entry of a

judgment of acquittal on the motorized vehicle counts must be denied.

B. Steptec's Fishing Equipment Count

In the second count of his citation, Steptec has been charged with "possessing motorized equipment within designated wilderness area," in violation of 36 C.F.R. § 261.16(a), based upon his use of a power ice auger within a restricted area of the BWCAW. The use of fishing; equipment presents a different issue than that raised by the claimed right to motorized travel to and from fishing grounds. Cases clearly hold (and the United States concedes) that tribal members are not precluded from using hunting and fishing implements that are more modern than those used when the Treaty of 1854 was enacted. See Mille Lacs, 952 F.Supp. at 1366; Lac Courte, 653 F.Supp. at 1430. As such, the United States may limit a tribal member's use of modern fishing equipment only if it is an aspect of a valid, non-discriminatory conservation measure. See Puyallup, 391 U.S. at 395.

While the prohibition on the use of motorized travel throughout the BWCAW is vital to maintain the conservation of the Wilderness Area, the conservation interest in preventing the occasional drilling of a fishing hole

with the use of a motorized auger is more uncertain. The use of fishing equipment itself falls squarely within the conduct protected by the 1854 Treaty. Unless the United States can demonstrate a sufficient conservation interest, it may not abridge the tribal right to use available fishing equipment and methods absent a direct abrogation of that right by Congress. Defendant Steptec's Motion for Judgment of Acquittal as to his citation for use of the motorized ice auger is granted.

IV. CONCLUSION

Based upon the foregoing, and on all of the files, records, and proceedings herein, **IT IS HEREBY ORDERED** that:

1. Defendant Steptec's Motion for Entry of Judgment of Acquittal as to Citation No. F064176 ("Using Motor Vehicle in Designated Wilderness Area (ATV)") is **DENIED;**

2. Defendant Steptec's Motion for Entry of Judgment of Acquittal as to Citation No. F064177 ("Possessing Motorized Equipment Within Designated Wilderness; Auger") is Defendant Steptec's Motion for Entry of Judgment **GRANTED**; and,

3. Defendant Gotchnik's Motion for Entry of Judgment of Acquittal as to Citation No. F064197 ("Motorized in Non-Motor Area (US Point) within BWCA Wilderness") is **DENIED.**[4]

Ann D. Montgomery
UNITED STATES DISTRICT JUDGE

Dated: May 28, 1999

[4] All remaining issues in this matter are referred to Magistrate Judge Raymond L. Erickson for disposition. The parties are ordered to contact Judge Erickson's clerk, Vicki Miller, to obtain a date and time for further proceedings.

UNITED STATES COURT OF APPEALS

FOR THE EIGHTH CIRCUIT

No. 99-4288/4289/4290/4292/4293MNST

United States of America,

Appllee,

v.

David Jon Gotchnik, Mark Francis Stepec, Terry Lee Anderson, Thomas Jay Anderson,

Appellants.

Order Denying Petition for Rehearing and for Rehearing En Banc

The petition for rehearing en banc is denied. The petition for rehearing by the panel is also denied.

(5128-010199)

October 10, 2000

Order Entered at the Direction of the Court:

/S/

Clerk, U.S. Court of Appeals, Eighth Circuit

Section 4 of the Boundary Waters Canoe Area Wilderness Act of 1978 (the Act), Pub. L. No. 95-495, §4, 92 Stat. 1649

ADMINISTRATION

SEC. 4. (a) The Secretary shall administer the wilderness under the provisions of this Act, the Act of January 3, 1975 (88 State. 2096, 16 U.S.C. 1132 note), the Wilderness Act of 1964 (78 Stat. 890, 16 U.S.C. 1131-1136, and in accordance with other laws, rules and regulations generally applicable to areas designated as wilderness.

(b) Paragraph (5) of section 4 (d) of the Wilderness Act of 1964, // 16 U.S.C. 1133 // is hereby repealed and paragraphs (6), (7), and (8) of such section 4(d) are hereby redesigned as paragraphs (5), (6), and (7).

(c) Effective on January 1, 1979 the use of motorboats is prohibited within the wilderness designated by this Act, and that portion within the wilderness of all lakes which are partly within the wilderness, except for the following:

(1) On the following lakes, motorboats with motors of no greater than twenty- five horsepower shall be permitted: Fall, Lake County; Newton, Lake County, Moose, Lake County; newfound, found, Lake County; Sucker, Lake County; Snowbank, Lake County; East Bearskin, Cook

County; South Farm, Lake County; Trout, Saint Louis County; Basswood, except that portion generally north of the narrows at the north end of Jackfish Bay and north of a point on the international boundary between Ottawa Island and Washington Island; Saganaga, Cook County, except for that portion west of American Point; Provided: That, on the following lakes, until January 1, 1984, the horsepower limitations described in this paragraph shall not apply to towboats registered with the Secretary: Moose, Lake County; Newfound, Lake County; Sucker, Lake County; Saganaga, Cook County, as limited in this paragraph.

(2) On the following lakes and river, motorboats with motors no greater than ten horsepower shall be permitted: Clearwater, Cook County; North Fowl, Cook County; South Fowl, Cook County; Island River east of Lake Isabella, Lake County; Sea Gull, that portion generally east of Threemile Island, Cook County; Alder, Cook County; Canoe, Cook County.

(3) On the following lakes, or specified portions of lakes, motorboats with motors of no greater than ten horsepower shall be permitted until the dates specified: Basswood River to and including Crooked Lake, Saint Louis and Lake Counties, until January 1, 1984; Carp Lake, the

Knife River, and Knife Lake, Lake County, until January 1, 1984; Sea Gull, Cook County, that portion generally west of Threemile Island, until January 1, 1999; Brule, Cook County, until January 1, 1994, or until the termination of operation of any resort adjacent to Brule Lake in operation as of 1977, whichever occurs first.

(4) On the following lakes, or specified portions of lakes, motorboats with motors of no greater than twenty-five horsepower shall be permitted until January 1, 1984: Birch, Lake County; Basswood, Lake County, that portion generally north of the narrows at the north end of Jackfish Bay and north of a point on the international boundary between Ottawa Island and Washington Island.

(d) The detailed legal description and map to be published pursuant to section 3 of this Act shall contain a description of the various areas where the motorized uses permitted by this section are located. No provision of this section shall be construed to limit mechanical portages or the horsepower of motors used on motorboats in the following areas within the wilderness:

Little Vermilion Lake, Saint Louis County; Loon River, Saint Louis County; Loon Lake, Saint Louis County; that portion of the Lac La Croix, Saint Louis County; south

of Snow Bay and east of Wilkins Bay.

(e) For the purposes of this Act, a snowmobile is defined as any motorized vehicle which is designed to operate on snow or ice. The use of snowmobiles in the wilderness designated by this Act is not permitted except that the Secretary may permit snowmobiles, not exceeding forty inches in width, on (1) the overland portages from Crane Lake to Little Vermilion Lake in Canada, from Sea Gull River along the eastern portion of Saganaga Lake to Canada, and (2) on the following routes until January 1, 1984:

Vermilion Lake portage to and including Trout Lake; Moose Lake to and including Saganaga Lake via Ensign, Vera and Knife Lakes, East Bearskin Lake to and including Pine Lake via Alder Lake and Canoe Lake.

In addition to the routes listed above the Secretary may issue special use permits for the grooming by snowmobiles of specified cross-country ski trails for day use near existing resorts.

(f) The Secretary is directed to develop and implement, as soon as practical, entry point quotas for use of motorboats within the wilderness portions of the lakes listed in subsection c, the quota levels to be based on such criteria as the size and configuration of each lake, and the amount of

use on that lake: Provided, That the quota established for any one year shall not exceed the average actual annual motorboat use of the calendar years 1976, 1977, and 1978 for each lake, and shall take into account the fluctuation in use during different times of the year: Provided further, That on each lake homeowners and their guests and resort owners and their guests on thatparticular lake shall have access to that particular lake and their entry shall not be counted in determining such use.

(g) Nothing in this Act shall be deemed to require the termination of the existing operation of motor vehicles to assist in the transport of boats across the portages from Sucker Lake to Basswood Lake, from Fall Lake to Basswood Lake, and from Lake Vermilion to Trout Lake, during the period ending January 1, 1984. Following said date, unless the Secretary determines that there is no feasible nonmotorized means of transporting boats across the portages to reach the lakes previously served by the portages listed above, he shall terminate all such motorized use of each portage listed above.

(h) The motorized uses authorized by this section shall be confined to those types of snowmobiles, motorboats and vehicles which have been in regular use in the Boundary

Waters Canoe Area prior to the date of enactment of this Act. The Secretary may set forth additional standards and criteria to further define the type of motorized craft which may be permitted.

(i) Except for motorboats, snowmobiles, and mechanized portaging, as authorized and defined herein, no other motorized use of the wilderness shall be permitted. Nothing in this Act shall prohibit the use of aircraft, motorboats, snowmobiles, or other mechanized uses in emergencies, or for the administration of the wilderness area by Federal, State, and local governmental officials of their deputies, only where the Secretary finds that such use is essential.